In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-597

ERNEST E. WEBBER, NELLYS F. WEBBER
and ROBERT A. WALLER,
Appellants,
vs.
CITY OF SACRAMENTO, SACRAMENTO CITY COUNCIL,
SACRAMENTO CITY PLANNING COMMISSION,
COUNTY OF SACRAMENTO,
SACRAMENTO COUNTY BOARD OF SUPERVISORS,
NATOMAS SEWER ASSESSMENT DISTRICT,
Appellees.

Appeal From the Supreme Court of California

RESPONSE TO JURISDICTIONAL STATEMENT

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STATEMENT OF THE FACTS

This case arises out of an appeal by appellants Webber and Waller (hereinafter Webber/Waller) from the judgment of the California Supreme Court. The California Supreme Court held that there is no cause of action in inverse condemnation as a result of land-use regulation. The County of Sacramento (hereinafter County) has joined with the City of Sacramento (hereinafter City) in opposing

the Jurisdictional Statement but each entity will be separately represented if the case is accepted for hearing. Upon review of the facts in this case, it is apparent that the County was in no way involved in enacting the Open Space Element which Webber/Waller contend constituted a taking for which money damages are owing.

In 1961, the prior owners of the land now owned by Webber and Waller petitioner the City for installation of sewer facilities. A sewer assessment district which included the Webber/Waller land was formed by the County. This was the last action taken by the County with respect to the land owned by Webber/Waller.

Later in 1961, the Webber/Waller land was annexed to the City. The improvements were completed and the assessments confirmed in 1965.

In 1973, the City enacted the Open Space Element of its General Plan. The County played no part in the enactment or enforcement of this ordinance. In effect, the Open Space Element of the General Plan simply stated the policy that the City would not rezone the property to higher use for a period of seven years from 1973. (Paragraph 2, under "Agricultural Areas", on page C-15.)

As a result of the enactment of the Open Space Element, the Webber/Waller land would remain zoned for agricultural use—just as it had been zoned and used at all times in the past. Nevertheless, Webber/Waller claim that their land was taken without just compensation and that the benefit supporting the assessments was without just compensation.

QUESTIONS PRESENTED

1. Has a cause of action for inverse condemnation been stated against the County?

2. Has there been a "taking" of property which would entitle Webber/Waller to compensation on an inverse condemnation theory?

3. Does zoning action which merely decreases the market value of property violate the constitutional provisions forbidding uncompensated taking or damaging of property?

4. Is the decision of the California Supreme Court to deny monetary relief in this land-use regulation case consistent with cases decided by the Supreme Court?

5. Do the cases cited by appellant to support the proposition that an aggrieved property owner's primary remedy for uncompensated taking is money damages involve land-use regulations?

6. Do aggrieved property owners in the State of California have the same relief as property owners in other states who assert that land-use regulation has caused them injury?

I

NO CAUSE OF ACTION IN INVERSE CONDEMNATION HAS BEEN STATED AGAINST THE COUNTY OF SACRAMENTO

To recover in an inverse condemnation case against the County, Webber/Waller must allege and prove that the County planned, approved, constructed, or operated a pub-

lic project, or was otherwise engaged in some activity for public use or benefit. *Stoney Creek Orchards v. State,* 12 Cal.App.3d 903, 91 Cal.Rptr. 139 (1970).

The County played no part in the enactment or enforcement of the Open Space Element. Webber/Waller claim that it was this ordinance that deprived them of the beneficial use of their property. Since the County was not in any way responsible for the Open Space Element, there is no cause of action for inverse condemnation against the County.

II

THERE HAS BEEN NO "TAKING" OF PROPERTY WHICH WOULD ENTITLE WEBBER/WALLER TO COMPENSATION ON AN INVERSE CONDEMNATION THEORY

Webber/Waller cite *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393 (1922) for the proposition that inverse condemnation is a remedy available in zoning cases. Justice Holmes' states in *Pennsylvania Coal Company* that ". . . while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at page 415. Justice Holmes uses the word "taking" to indicate the limit for land control by regulation before it becomes a "taking" by power of eminent domain.

This Court set aside the injunctive relief which had been granted by the Pennsylvania courts and declared void the exercise of police power which had limited the company's right to mine its land. The Court never mentioned that the power of eminent domain had been exercised, nor was the possibility of compensation even considered. Therefore,

Pennsylvania Coal Company cannot be used as support for the proposition that money damages based on inverse condemnation are available in zoning cases.

It is true as explained by Webber/Waller (Jurisdictional Statement at page 19) that but for the special benefit to the property by way of increased value, the special assessment would be unconstitutional as unequal taxation. It is not true, however, that when such availability is eliminated by governmental actions, a property right has been taken for public use so as to be compensible in inverse condemnation (Jurisdictional Statement at page 19).

In *Norwood v. Baker,* 172 U.S. 269 (1898), certain lands were condemned for opening of a street. An assessment was made on the appellee's land abutting on each side of the new street in an amount covering not simply a sum equal to that paid for the land taken for the street, but in addition costs and expenses connected with condemnation proceedings. The court held that ". . . there could be no justification for any proceeding which charges the land with an assessment greater than the benefits. It is a plain case of appropriating private property to public uses without compensation." *Id.* at 280. The proper remedy, however, was not inverse condemnation but instead to enjoin enforcement of the assessment that infringed upon the constitutional rights of the appellees. *Id.* at 291. The court said there was an improper assessment but no provision for damages based on an inverse condemnation theory was allowed. *Id.* at 296-97.

Therefore, the California Supreme Court has correctly decided that there is no right to recovery based on an inverse condemnation theory in zoning cases. This decision is in accordance with federal cases as decided by this Court. *See, e.g., Pennsylvania Coal Company v. Mahon,* 260 U.S. 393 (1922); *Norwood v. Baker,* 172 U.S. 269 (1898).

III

ZONING ACTION WHICH MERELY DECREASES THE MARKET VALUE OF PROPERTY DOES NOT VIOLATE THE CONSTITUTIONAL PROVISIONS FORBIDDING UNCOMPENSATED TAKING OR DAMAGING OF PROPERTY

The Webber/Waller land had always been used for agricultural purposes. Despite Webber/Waller's contention that the land is not valuable as farming land, the soil is perfectly suitable for agricultural purposes. Since there has been no deprivation of all reasonable use of the land in question, there has been no taking without compensation. In *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) the appellee claimed that the land in question had a market value of $10,000 per acre if used for industrial uses, but if the use be limited to residential purposes, the market value would not be in excess of $2,500 per acre. *Id.* at 384. The Court upheld the zoning regulation against the claim that it constituted a taking of the property in question.

IV

THE DECISION OF THE CALIFORNIA SUPREME COURT TO DENY MONETARY RELIEF IN THIS LAND-USE REGULATION CASE IS CONSISTENT WITH CASES DECIDED BY THE UNITED STATES SUPREME COURT

Webber/Waller assert that this court, in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 435 U.S. 1301 (1979), acknowledged the property owners' plea for monetary relief in zoning regulation cases. Webber/Waller further assert that since the Federal Courts have allowed monetary relief and the California Supreme Court has denied such, in effect there will be a vast transfer of local land use cases to the Federal Court system. This might very well be true if *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency* dealt with the specific issue of whether land use regulations can result in a taking which must be compensated.

In *Lake Country Estates, Inc.*, California and Nevada entered into a compact to create Tahoe Regional Planning Agency (hereinafter TRPA) which was to coordinate and regulate development in the Lake Tahoe Basin Resort Area and to conserve its natural resources. TRPA adopted a land-use ordinance that destroyed the value of petitioner's property in violation of the Fifth and Fourteenth Amendments. The central issue in this case was whether the individual respondents who enacted this land-use ordinance and carried it out were immune from liability for conduct of alleged legislative character and qualifiedly immune for executive action. Although the court makes reference to the finding of the district court that a sufficient cause of action

for inverse condemnation had been stated, this issue is never addressed in the opinion of the Supreme Court. Therefore, it can hardly be said that *Lake Country Estates* stands for the proposition that monetary relief is available in land-use regulation cases.

In addition, Webber/Waller cite *Gordon v. City of Warren*, 579 F.2d 386 (1978, 6th Circuit); *Barbaccia v. County of Santa Clara*, 451 F.Supp. 260 (1978, N.D. Cal.); *Sanfiliop v. County of Santa Cruz*, 415 F.Supp. 1340 (1976, N.D. Cal.); *Dahl v. City of Palo Alto*, 372 F.Supp. 647 (1974, N.D. Cal.), as examples of lower federal courts which have acknowledged the property owners' plea for monetary relief in zoning regulation cases. Again, the property owners' plea for monetary relief has been acknowledged, but money damages were not allowed absent actual physical damage or invasion, confiscatory intent or bad faith on the part of the government. To award money damages, the court must find that the regulations in question allow no reasonable use of the complainants' property or are exceptionally restrictive.

In the case at bar, neither physical damage or invasion, nor confiscatory intent or bad faith on the part of the government has been alleged. The Open Space Element still allows reasonable use of the property for agricultural purposes. The California Supreme Court denied money damages because there has been no physical invasion or unreasonable regulation. The decision of the California Supreme Court is thereby identical to decisions in similar cases by the Supreme Court of the United States: Money damages are not allowed in the absence of a "taking".

V

AN AGGRIEVED PROPERTY OWNER IN THE STATE OF CALIFORNIA HAS THE SAME RELIEF AS PROPERTY OWNERS IN OTHER STATES WHO ASSERT THAT LAND-USE REGULATIONS CAUSED THEM INJURY

Webber/Waller complain that the decision of the California Supreme Court denying monetary relief in land-use regulation cases like the one at bar is inconsistent with the decisions of other district courts. They assert that the same property owner in other states would have a right to damages in inverse condemnation for the same land-use regulations. (Jurisdictional Statement at p. 30.)

Webber/Waller then go on to cite cases where aggrieved property owners have allegedly recovered money damages in inverse condemnation cases as a result of land-use regulations. Webber/Waller use the language " . . . in inverse condemnation for *admittedly* confiscatory land-use regulations". The word "admittedly" is important because in all the cases cited by Webber/Waller, there has been some substantial taking of the property in question which was "admittedly" confiscatory. *Lomarch Corp. v. City of Englewood*, 237 A.2d 471 (1968, N.J.) (Upon a municipality taking title, there shall be payment); *Hermanson v. Board of County Commissioners, etc.*, 595 P.2d 694 (1979, Colo.) (Regulations designed to depress value with a view to future acquisition) There are no "admittedly" confiscatory land-use regulations involved in the instant case.

In the case at bar, there has been no taking either in the form of physical invasion or a substantial deprivation

of property use constituting a taking. In *Village of Willoughby Hills v. Corrigan*, 278 N.E.2d 658 (1972, Ohio), *cert. denied, sub. nom.*, the court held that airport zoning regulations restricting buildings on plaintiff's land to 70 feet did not constitute an unconstitutional taking. In *Moviematic Industries, Inc. v. Dade County*, 349 So.2d 667 (1977 Fla.), the court held that a county resolution rezoning the corporation's property from heavy industrial use to single-family residential use did not render the land valueless and, therefore, did not amount to a constructive taking. The court further went on to say that it is not necessary to permit the highest and best use of land in order to avoid liability for inverse condemnation.

Despite the fact that Webber/Waller cite the above cases claiming that they stand for propositions different than those followed by the California Supreme Court, these cases actually stand for propositions which have been followed by the California Supreme Court. There is no disagreement among the courts. If there has been a "taking", money damages are available. If there has not been a "taking", money damages are not available. There has been no "taking" in the case at bar.

Webber/Waller then cite *Kmiec v. Town of Spider Lake*, 211 N.W.2d 471 (1973, Wis.) and *Fred F. French Investing Company v. City of New York*, 39 N.E.2d 381 (1976, N.Y.) claiming that these cases are examples of decisions by federal courts which represent different interpretations of the United States Constitution than that presently followed by the California Supreme Court.

On the contrary, these cases stand for the proposition that:

> "In all but exceptional cases, nevertheless, such a regulation is not equal to a taking and is, therefore, not compensable, but amounts to a deprivation or frustration of property rights without Due Process of law and is, therefore, invalid. *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 385 (1976, New York).
>
> ". . . The goal of challenging land use disputes is to preclude application of the measure to the restricted parcel on the basis of constitutional infirmity. What is achieved is declaratory relief, the sole exception to this mild outcome occurs where the challenge measure is either intended to eventuate in actual public ownership of the land or has already caused the government to encroach on the land with trespassory consequences that are largely irreversible." *Id.* at 385 (quoting Costonis, "Fair" Compensation and the Accommodation Power: Antedotes for the Taking of Empasse in Land Use Controversies, 1975, Col. L. Rev. 1021, 1035.)

This is exactly the rationale followed by the California Supreme Court.

After having reviewed the authority cited by Webber/Waller, none of these cases are in direct conflict with the present stance of the California Supreme Court. Therefore, there is no danger that the remedy for violation of the Federal Constitution will be different in one state than another.

VI

THE CALIFORNIA SUPREME COURT DID PROVIDE AN ADEQUATE REMEDY FOR WEBBER/WALLER

Webber/Waller challenge the assessment to install sewer facilities on the ground that it was unreasonable to assess the property and then not allow the property owners to benefit from this assessment. It is difficult to characterize this challenge as "inverse condemnation", but this is not to say that Webber/Waller should go uncompensated.

The California Supreme Court did, in fact, fashion a remedy for Webber/Waller. The remedy was to return Webber/Waller to the status quo. According to this remedy, either the property must be reassessed in a manner to relieve Webber/Waller for inequitable assessments or the Open Space Element of the General Plan is to be invalidated leaving Webber/Waller with that which they had at all times, approximately 350 acres of farm land zoned for that use and located in several square miles of other farm land.

The Open Space Element of the General Plan was adopted by the City of Sacramento as a municipal ordinance and this court has held that local ordinances are state statutes for the purposes of 28 U.S.C. 1257(2). *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 207 n.3 (1975).

Although the aforementioned remedy is stated in the alternative in the California Supreme Court opinion, there can be no argument that the mandatory remedy is invalidation of the state statute. Therefore, this issue fails to

meet the requirements of 28 U.S.C. 1257(2) which requires that the state statute be held valid to be eligible for appeal to this court.

The clear precedent of the United States Supreme Court supports the conclusion of the California Supreme Court on the issue of whether Webber/Waller's land was taken without just compensation. Since the state statute involved was invalidated, the issue regarding the assessment loss should not be reviewed by this court on appeal. 28 U.S.C. 1257(2).

CONCLUSION

For all the foregoing reasons, the City and County of Sacramento respectfully submit that the Court should dismiss this matter.

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